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No. .....

In The
# Supreme Court of the United States
October Term, 1984

JOE E. LUTJEHARMS, Commissioner of Education, *et al.*,

*Petitioners,*

vs.

GEORGE ROSE, as next friend of MARLA ROSE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals can award attorney fees under § 1988 without making a specific finding that a particular defendant violated § 1983?

2. Is an award of attorneys' fees under § 1988 proper where a plaintiff alleges a § 1983 cause of action independent of the Education for All Handicapped Children Act (EAHCA) but does not prevail on that independent cause of action or that independent cause of action is not reached by the court in disposing the case?

3. Whether an award of attorneys' fees against a public officer "in his official capacity" imposes liability on the entity he represents if that entity is dismissed from the case?

## LIST OF PARTIES

JOE E. LUTJEHARMS,[1] Commissioner of Education, *et al.*

*Petitioners,*

v.

GEORGE ROSE, as Next Friend of MARLA ROSE

*Respondent.*

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[1] This action was originally brought against 25 state and school district defendants in addition to Ann Campbell, who was sued solely in her official capacity as Nebraska Commissioner of Education. Ann Campbell has retired and been replaced by Joe E. Lutjeharms. Pursuant to Rule 43(c)(1) of the Federal Rules of Civil Procedure, Lutjeharms was automatically substituted as a party. On the third appeal, the United States Court of Appeals for the Eighth Circuit awarded attorneys' fees in the amount of $9,540.00 against the Nebraska Commissioner of Education and the members of the Nebraska State Board of Education in their official capacities. It did not award attorney fees against any other defendant.

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## OPINIONS BELOW

Each of the opinions of this case have been reported, to wit:

*Monahan v. State of Nebraska,* 491 F.Supp. 1074 (D. Neb. 1980).

*Monahan v. State of Nebraska,* 645 F.2d 592 (8th Cir. 1981).

*Rose v. State of Nebraska,* 530 F.Supp. 295 (D. Neb. 1981).

*Monahan v. State of Nebraska,* 687 F.2d 1164 (8th Cir. 1982).

*Rose v. State of Nebraska,* 575 F.Supp. 132 (D. Neb. 1983).

*Rose v. State of Nebraska,* 748 F.2d 1258 (8th Cir. 1984).

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## JURISDICTION

The opinion of the Court of Appeals was filed November 26, 1984. The arm of the writer of this petition was subsequently broken in five places which resulted in his being off work for a considerable amount of time. At his request, Associate Justice Blackmun issued an Order granting Petitioner's request to extend the time in which to file this Petition to March 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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## STATEMENT OF THE CASE

### I. Preliminary Statement

Respondent Marla Rose brought this action in the District Court on March 6, 1980, through her next friend, seeking damages and injunctive relief against the State of Nebraska, the State Board of Education, the Governor, the Nebraska Commissioner of Education (hereinafter, "Commissioner"), all of the members of the State Board of Education except co-plaintiff James H. Monahan (next friend of Daniel Monahan), and the School District of Omaha (hereinafter, "Omaha School District"), together with all of the members of its Board of Education, its Superintendent and Assistant Superintendent (P. 1).[1]

Marla Rose alleged that she was a handicapped child, that an impartial due process special education hearing regarding her educational placement had been requested and held, and that the hearing and decision that she should be placed at the Nebraska School for the Deaf were not in conformity with the requirements of 20 U.S.C. § 1415 (P. 1). Relief was also sought on behalf of a class of similarly situated handicapped children, but the District Court found it unnecessary to consider certification of the class (P. 33, 43).

Marla Rose immediately moved for a preliminary injunction setting aside the administrative hearing decision

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1. P. stands for the pleading, as the Court of Appeals Court determined on December 7, 1983, that it would hear this appeal on the original file from the District Court in lieu of the designated record required by Circuit Rule 7. The numbers which follow P are the docket numbers assigned to the pleadings by the Clerk of the District Court.

in her case, enjoining the Commissioner from conducting such hearings or appointing hearing officers, and reinstating her former educational placement (P. 2). On April 4, 1980, Petitioners jointly moved for dismissal based on lack of jurisdiction and failure to state a claim upon which relief could be granted (P. 12). The District Court entered a preliminary injunction on May 16, 1980, which ordered the Commissioner to appoint an impartial hearing officer to hold a second due process hearing on Marla Rose's educational placement, enjoined the Commissioner from engaging in any review of the hearing officer's decision, and directed the Commissioner to implement such decision without modification (P. 20). The preliminary injunction also required that Marla Rose be *returned* by her parents to her former educational placement in the Omaha School District during the pendency of the case.

The Petitioners appealed the preliminary injunction, and the District Court denied a stay pending appeal (P. 22 and 26). Petitioners then sought a stay of the preliminary injunction from Court of Appeals. On July 8, 1980, the Court of Appeals stayed that portion of the preliminary injunction which required the Commissioner to appoint a hearing officer to conduct a second due process hearing on Marla Rose's complaint and which enjoined the Commissioner from reviewing or modifying the hearing officer's decision (P. 31). On April 1, 1981, the Court of Appeals vacated that part of the preliminary injunction requiring a second administrative hearing for Marla Rose, and it remanded the case to the District Court for an early hearing and decision of all issues relating the educational placement of Marla Rose (P. 32).

On remand, Petitioners filed suggestions of emancipation and mootness based: (1) a 1980 amendment to the Nebraska Statutes governing special education due process hearings; (2) Marla Rose's emancipation and change of residence to the Millard School District; and (3) the Court of Appeals' Opinion of April 1, 1981 (P. 34, 35 and 41). After the death of the Honorable Robert V. Denney, the case was reassigned to the Honorable Richard E. Robinson (P. 37). A hearing on Petitioners' motion to dismiss was conducted on August 25, 1981, and the action was dismissed without prejudice by the District Court on October 9, 1981 (P. 42).

The Respondents appealed from the dismissal (P. 44). On August 30, 1982, the Court of Appeals entered an opinion affirming the dismissal without prejudice, except to the extent that it rejected the claim of Marla Rose for attorney's fees and costs through the first appeal (P. 48). In this limited respect, the judgment of the District Court was vacated and the case was remanded. Marla Rose's petition for rehearing was denied by the Court of Appeals on October 1, 1982, and her petition to the U.S. Supreme Court for a writ of certiorari was denied on February 28, 1983 (P. 49).

On the second remand Marla Rose filed a motion on May 2, 1983, for a hearing to determine the attorney's fees and costs to be awarded (P. 50). Attached to this motion was the affidavit of attorney Quintin S. Hughes stating that throughout the proceedings he had been the *sole* attorney representing Plaintiff Rose (P. 50). Also attached were affidavits and time summaries for Plaintiff James H. Monahan and two other attorneys who had represented Plaintiff Monahan in the proceedings. The

hearing was conducted by the District Court on August 18, 1983, and the testimony of several witnesses for Plaintiff Rose and various exhibits were received in evidence (P. 51-53). On November 10, 1983, the District Court entered an Order granting Respondent Rose judgment against *all* Defendants for an attorney's fee award of $8,540 for the services of Quintin Hughes, while denying relief as to costs and all other attorney's fee requested (P. 54).

On December 6, 1983, George Rose filed *pro se* a notice of appeal on behalf of himself as next friend of his *emancipated* adult daughter (P. 55). Petitioners cross-appealed on December 12, 1983 (P. 57 and 58). Attorney Quintin Hughes filed a motion in the District Court on December 19, 1983, for permission to *withdraw* as Plaintiff Rose's counsel due, inter alia, to his disagreement of George Rose's decision to take the appeal (P. 60). The District Court granted Hughes' motion on December 21, 1983 (P. 62). George Rose subsequently filed a *pro se* appellant's brief with the Court of Appeals in 83-2678 on January 25, 1984, which was two days after the brief was due. Thereafter, James H. Monahan filed an entry of appearance in No. 83-2678 on February 10, 1984, on behalf of "appellees on cross-appeal of State of Nebraska, et al."[2]

On November 26, 1984, the Court of Appeals modified the judgment of the District Court so that no fee award is made as against the State of Nebraska, the State Board of Education as a board, the Governor of Nebraska, or

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2. Contrary to the appearance filed by Mr. Monahan, No. 83-2678 is not the cross-appeal, and he does not represent the State of Nebraska in that appeal.

the Omaha School District. The award of fees in the amount of $9,540.00 against the Commissioner of Education in her official capacity and the members of the State Board of Education in their official capacities was affirmed. Each side to bear its own costs. *Rose v. Nebraska,* 748 F.2d 1258, 1264 (8th Cir. 1984).

## II. Statement of Facts

Marla Rose Corrado[3] is now a 22-year old housewife who is profoundly deaf and has a related language impairment. (Tr. 16:20,23:4, and 178:8; Ex. 5, pp. 16-17).[4] The matter of what constituted an appropriate educational placement for Marla was the subject of an ongoing disagreement between the Omaha School District and Marla's parents from 1971 until she was married and moved from the Omaha School District in 1981 (Ex. 5, p. 47; P. 34 and 41). The essence of this disagreement was whether or not methods of manual communication or "total communication" should be introduced into Marla's educational program (Tr. 178:9 to 179:1). Marla's father, Mr. George Rose, refused to permit any use of sign language or manual communication in his daughter's special education program at the Omaha School District over the years, even though Marla had shown little progress in the oral program she was receiving (Tr. 92:21 to 93:18; Ex. 5, pp. 38-40 and p. 45).

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3. Marla Corrado, nee Rose, was married to Timothy J. Corrado on May 3, 1981 (P. 34). Hereinafter she is referred to as Marla Rose.

4. Tr. stands for transcript of the proceedings before the Honorable Robert V. Denney on March 12 and 24, 1980 (P. 29). Ex. stands for exhibit admitted into evidence at the hearing on March 24, 1980.

After the procedural provisions of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415, became effective on October 1, 1977, the Omaha School District's staff again viewed Marla's placement and progress. Thereafter, the required notice was given to Mr. and Mrs. George Rose in June of 1978 of a proposal to change Marla's educational placement for the following school year (Tr. 16:21 to 18:1; Ex. 5, p. 40). The District offered to place Marla at the Nebraska School for the Deaf at Omaha as a day student where she could receive the benefit of an educational program utilizing the total communication method as well as a social setting where Marla's fellow students and teachers would be fluent in sign language.

George Rose responded to the Omaha School District's notice in August of 1978 by filing a petition with the Nebraska Department of Education to obtain a due process hearing regarding what constituted an appropriate educational placement for Marla (Tr. 18:14-25). The case was assigned to an independent hearing officer, and George Rose's counsel was granted continuances to obtain the depositions of expert witnesses in Mystic, Connecticut (Tr. 74:21 to 76:15). Upon the completion of the depositions, the hearing officer promptly set the case down for hearing beginning on January 16, 1979 (Tr. 76:15-25; Ex. 5, p. 1).

In addition to the depositions taken in Mystic, Connecticut, a total of 16 persons were called by the parties to testify during the course of the administrative hearing which consumed 8½ days between January 16 and March 23, 1979 (Tr. 59:12-13; Ex. 5). Following receipt of the trial brief of Mr. Rose's counsel on May 11, 1979, the in-

dependent hearing officer transmitted his report containing a summary of the evidence, findings of fact and decisions to the Commissioner on May 16, 1979 (Tr. 81:22-12; Ex. 5, p. 46; Ex. 1, p. 1). The decision noted that neither party was satisfied with Marla's placement at Beveridge Junior High School which had continued through the course of the administrative hearing (Ex. 5, p. 47). Because of Marla's failure to attain an ability to communicate over the many years while she received instruction by the oral method, the hearing officer concluded on the basis of the expert testimony that some form of manual communication was essential to Marla if she was ever to achieve any progress (Ex. 5, pp. 50-52). Since the Nebraska School for the Deaf offered a total communication program and an otherwise unavailable opportunity for Marla to learn to communicate in the social context as well as during instruction, the hearing officer found that the Omaha School District's recommendation constituted an appropriate educational placement for Marla (Ex. 5, p. 47 and pp. 52-54). Accordingly, the hearing officer recommended that the Commissioner dismiss the Rose appeal (Ex. 5, p. 47).

On June 1, 1979, the Commissioner entered an order acknowledging receipt of the hearing officer's report and the hearing exhibits, adopting the report *verbatim* as a basis for the order, and dismissing George Rose's appeal (Ex. 1). Mr. George Rose filed his first federal action appealing the Commissioner's order in the United States District Court for the District of Nebraska in June of 1979 (CV 79-0-300). This first case was subsequently dismissed by that Court in November of 1979 for failure to join an indispensible party (Tr. 36:11 to 37:5; Tr. 38:10-

12). While the first action was pending, the parties through their counsel entered into a stipulation providing that Marla's "then current" educational placement during the 1978-79 school year would be continued during the 1979-80 school year except that the program would be relocated from Beveridge Junior High School to Monroe Junior High School, both of which are operated by the Omaha School District (Ex. 6; Tr. 37:9 to 38:9).

Marla was *withdrawn* from Monroe Junior High *by her parents* after only two weeks of school in September of 1979, as they felt that the Omaha School District had not followed the terms of the stipulation with respect to the amount of time Marla was spending in special education (Tr. 29:8 to 31:2 and 34:1-5). Thereafter, she attended an unaccredited private school selected by her parents (Tr. 33:23-25, 34:16-18; and Tr. 41:6-13).

Upon receiving the complaint of Mr. and Mrs. Rose regarding Marla's schedule, the Assistant Superintendent of the Omaha School District, Dale Samuelson, investigated the matter and found that due to differing schedule systems in each junior high school, Marla was receiving approximately one hour per week more of special education at Monroe than had been the case at Beveridge (Tr. 160:10 to 161:19). He contacted Mr. and Mrs. Rose in October of 1979 and offered to change her class schedule by reducing the special education component for that length of time. This offer was *never accepted,* and Marla did not return to classes in the Omaha School District during the balance of 1979-80 school year (Tr. 161:2-162:6).

A second action appealing the Commissioner's Order was filed by Mr. Rose in the United States District Court

for the District of Nebraska on February 5, 1980 (CV 80-0-67). This case was subsequently dismissed on October 23, 1980, because it was duplicative of the present litigation. The complaint in the present action, the third challenge to the Commissioner's order in the Rose case, was filed on March 6, 1980, and the preliminary injunction requiring that Marla be *returned* by her parents to her placement in the Omaha School District was entered on May 16, 1980 (P. 1 and 20). (Des. R. 1-13 and 108-110).

Although the portion of the preliminary injunction requiring Marla to be returned to the Omaha School District's classes was not stayed during the appeal, Marla's parents *did not return her* to such classes until November 3, 1980. While the first appeal to this Court was pending, Marla ceased attending school altogether following her eighteenth birthday on February 3, 1981 (P. 34). On May 3, 1981, just three days after this Court issued its first mandate in this action, Marla was married to Timothy Corrado. The couple then took up residence in an apartment outside the boundaries of the Omaha School District and within the boundaries of the Millard, Nebraska, School District (P. 41). On January 14, 1982, Marla enrolled in the Millard School District and was placed at the Nebraska School for the Deaf where she attended classes until January 20, 1984, at which point in time she had attained sufficient credits to receive her high school diploma.

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## REASONS FOR GRANTING THE PETITION

### I.

### The Law Of The Case Doctrine, When Applied On The Record Of The Present Case, Precludes An Award Of Attorneys' Fees.

The doctrine of the law of the case is that a court's decision on a question presented in a former appeal must be followed in all subsequent proceedings in the same case, unless such decision is clearly erroneous and works manifest injustice or unless the evidence introduced at the subsequent trial is substantially different from that considered on the prior appeal. *E.g., Otten v. Stonewall Insurance Co.,* 538 F.2d 210, 212 (8th Cir. 1976). When an issue was not submitted on the prior appeal, the doctrine of the law of the case is, of course, inapplicable. *E.g., Nucor Corp. v. Tennessee Forging Steel Service, Inc.,* 513 F.2d 151, 153 (8th Cir. 1975).

On the third appeal, Rose asserted that the Court had previously determined that attorney's fees were to be awarded to him. A close review of *Monahan v. State of Nebraska,* 687 F.2d 1164 (8th Cir. 1982), however, discloses the following determinations, several of which are fundamentally inconsistent with Rose's assertion:

(1) The alleged inconsistency between Nebraska law and the EAHCA is now moot;

(2) The matter of a proper educational placement for Marla Rose is now moot;

(3) No damages are available to Rose for the alleged violations of the EAHCA;

(4) Rose failed to allege a cause of action under § 504 of the Rehabilitation Act;

(5) Rose was the prevailing party at the preliminary injunction stage;

(6) Rose prevailed, to the extent that he did at all, *only* on his EAHCA ground;

(7) The EAHCA contains no provision for attorneys' fees;

(8) Rose's claim that the injection of the Nebraska Commissioner of Education into the hearing process violated the Fourteenth Amendment *could* be the basis for an action under 42 U.S.C. § 1983 and an award of attorneys' fees under 42 U.S.C. § 1988;

(9) An award of attorneys' fees is appropriate where a non-fee claim is joined with a *non-frivolous* claim under a statute providing for the award of fees, and where plaintiff prevails with respect to his non-fee claim; and

(10) Rose's constitutional claim against the Commissioner for her role in the hearing process was *properly dismissed* either for failure to state a claim upon which relief could be granted or by reason of mootness due to the statutory amendment.

The only fee claim under §§ 1983 and 1988 arising from Rose's complaint was "that the injection of the Nebraska Commissioner of Education into the hearing process prevented that process from being impartial, in violation of the Due Process Clause of the Fourteenth Amendment." *Monahan v. State of Nebraska, supra,* 687 F.2d at 1172. The Court was careful to state, "A claim of that kind, of course, *can* be the basis of an action under 42 U.S.C. § 1983. . . ." [Emphasis added.] *If* the constitutional claim was "non-frivolous," the Court stated that an award of attorneys' fees would be appropriate. Yet, it is apparent that the Court found Rose's constitutional claim to be

wholly insubstantial and frivolous, since it affirmed the dismissal of the complaint by the District Court.

Had Rose alleged facts in his complaint showing that the Commissioner's role in the hearing process denied constitutionally guaranteed due process, such claim would have been actionable, even if only for *nominal damages* assuming no proof of actual injury, and a *remand* for such a determination would have followed. *E.g., Pollock v. Baxter Manor Nursing Home,* 716 F.2d 545 (8th Cir. 1983). The Court, however, *upheld* the District Court's dismissal of Rose's constitutional claim, save for a remand for the limited purpose of determining attorneys' fees and costs. Thus, it is part of the law of the case that Rose's constitutional claim arising from the Commissioner's "injection" into the hearing process was *non-actionable.* Certainly no one would contend that a subsequent change in the statutory hearing procedure would render moot Rose's claim for damages arising from a constitutional deprivation, had one occurred, even if only nominal damages were involved. Rather, it is apparent that the second panel, in sustaining the dismissal of Rose's constitutional damage claim against the Nebraska Commissioner, accepted as the law of the case the following determination made in the first appeal:

> "The record establishes that the placement hearing was free from procedural error save for the alleged impermissible review by the Commissioner. This review, however, amounted to no more than a rubber stamp of the hearing officer's decision."

*Monahan v. State of Nebraska,* 645 F.2d 592, 599 (8th Cir. 1981). Rose had not and could not allege facts showing how the Commissioner's "rubber stamp" violated the Due

Process Clause of the Fourteenth Amendment. Absent a substantial constitutonal claim under § 1983, there was no basis for the Court of Appeals to award attorneys' fees to Rose under § 1988, and such award was reversible error under the doctrine of the law of the case.

It should also be noted that the parties did not brief and the Court of Appeals made no decision in prior appeals concerning the Eleventh Amendment defenses of the State of Nebraska defendants under §§ 1983 and 1988 for actions by the Commissioner of Education. These defenses were simply not ripe for adjudication on the prior appeal, as the District Court had not been required to rule on these matters.

## II.

### The Court Of Appeals' Award Of Attorneys' Fees Violated The Exclusivity Exception To The Thiboutot Doctrine And The Teachings Of Smith v. Robinson.

It is well settled law that a § 1983 cause of action does not lie where Congress has foreclosed a § 1983 remedy through sufficiently comprehensive remedial devices in the federal statute underlying the claim. *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 19, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981). It is also well settled law that the remedial devices in the EAHCA are sufficiently comprehensive to demonstrate congressional intent to preclude an award of attorney fees under § 1988 unless the plaintiff alleges a § 1983 cause of action independent of EAHCA and prevails on that independent claim. *Smith v. Robinson,* — U.S. —, 82 L.Ed. 2d 746, 104 S.Ct. 3457 (1984).

Given the lack of a § 1983 remedy for Rose's EAHCA claims as well as this Court's declaration as to the unavailability of attorneys' fees for EAHCA claims, the Court of Appeals award of attorneys' fees under § 1988 against the Commissioner of Education and the members of the State Board of Education in their official capacities was clearly reversible error. As the Court of Appeals stated in *Monahan v. State of Nebraska, supra,* 687 F.2d at 1171, "After the claims of EAHCA violations and procedural inconsistencies between the Nebraska statute and EAHCA are laid to one side, *nothing of substance* in the way of allegations of fact *remains*. . . ." [Emphasis added.] Thus, the Commissioner of Education and the members of the State Board of Education have suffered a judgment for a § 1988 award of attorneys' fees under EAHCA in violation both of the *Middlesex* exclusivity doctrine and of this Court's determination that EAHCA makes no provision for attorneys' fees.

Moreover, as to the injunction against the Commissioner, the Court of Appeals held in *Monahan v. State of Nebraska, supra,* 687 F.2d at 1172, that ". . . complainant prevailed, to the extent that he did at all, on his EAHCA ground." Because the District Court already had jurisdiction over Rose's action under the EAHCA, there was no need to determine the substantiality of Rose's § 1983 constitutional claim involving the role of the Commissioner in the due process hearing in order to reach a pendent claim. Accordingly, no constitutional issue was presented by Rose's complaint, and the award of attorneys' fees against the Commissioner was founded squarely upon the EAHCA. To permit this award to stand, assuming, *arguendo,* that the Eleventh Amendment did not pre-

clude such an award, would be to subvert the exclusivity doctrine announced in *Middlesex, supra.* When Congress adopted the EAHCA, it intentionally foreclosed the § 1983 remedy including the availability of attorneys' fees under § 1988 by adopting a comprehensive administrative and judicial scheme of remedies, which are inconsistent with § 1983, but which nonetheless supplant §§ 1983 and 1988, unless the plaintiff alleges and proves a cause of action independent of the EAHCA, which Rose did not.

## III.

### It Was Clearly Erroneous And Manifestly Unjust To Award Rose Fees In The Amount Of $9,540.00 Against The Commissioner Of Education In Her Official Capacity And The Members Of The State Board Of Education In Their Official Capacities.

Prior to the last appearance of this case in the District Court and the Court of Appeals, neither court had ever held an award of attorneys fees *jointly* against the Commissioner of Education in her official capacity and the members of the State Board of Education in their official capacities was proper. Moreover, there is not a shred of evidence that either ever acted outside of their statutory powers and duties. As previously demonstrated herein, an award of attorney fees against the Commissioner of Education is manifestly unjust because on the first appeal the Court of Appeals had held that Rose had not suffered any injury, factually or legally, because the Commissioner had adopted the hearing officer's report "verbatim" and therefore had not become a part of the decisional process and that holding, as to the Commissioner of Education, became the law of the case. See, *Monahan v. State of Nebraska,* 645 F.2d 592, 599 (8th Cir. 1981).

Likewise, there is not a shred of evidence that members of the State Board of Education in their official capacities ever acted outside their official capacities or that Rose suffered any injury, factually or legally, because of any action or inaction taken by the members of the State Board of Education. The Eleventh Amendment immunity of the State of Nebraska extends to the State Board of Education, an arm of the state. Neb.Const.Art. VII, §§ 3 and 4. See, e.g., *Alabama v. Pugh*, 438 U.S. 781 (1978); *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). The State Board of Education is a body corporate. Neb. Rev. Stat. § 79-325 (Reissue 1981). Therefore, its members can only act officially as a corporation and not officially as individuals. It follows that since the State Board of Education as a corporation is entitled to the Eleventh Amendment immunity of the State of Nebraska its members in their official capacity are likewise entitled to the Eleventh Amendment immunity of the State of Nebraska.

There is another reason why an award of attorney fees in the amount of $9,540.00 against the Commissioner of Education in her official capacity and the members of the State Board of Education in their official capacity is manifestly unjust. This Court has held that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided the public entity received notice and an opportunity to respond. *Brandon v. Holt*, — U.S. —, — L.Ed.2d —, 105 S.Ct. 873, 878 (1985). Here, the Court of Appeals squarely held that the Eleventh Amendment bars this suit and the award of any attorney fees made against the State of Nebraska and the State Board of Education as a board. *Rose v.*

*State of Nebraska,* 748 F.2d 1258, 1262 (8th Cir. 1984). The State of Nebraska is the entity the Commissioner of Education represents in her official capacity and is also the entity the members of the State Board of Education represent in their official capacity. It follows that the Eleventh Amendment bars this suit and the award of any attorney fees made against the Commissioner of Education in her official capacity and in addition, the Eleventh Amendment also bars this suit and the award of any Attorney fees made against the members of the State Board of Education in their official capacity. *Brandon v. Holt, supra.*

There is yet another reason why an award of attorney fees would be manifestly unjust in this case. The general rule is that relief sought nominally against a public servant is in fact against the sovereign if the decree would operate against the latter. *Hawaii v. Gordon,* 373 U.S. 57, 58 (1963). There is an exception to the general rule: a suit challenging the constitutionality of a state official's action is not one against the State. *Ex parte Young,* 209 U.S. 123 (1908). The need to reconcile these two competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated his constitutional rights but (1) fails to prove the same or (2) the court does not reach the constitutional allegation in disposing the case. In such circumstances the entire basis for the doctrine in *Young* disappears. Simply stated, a federal court's grant of attorney's fees against state officials on the basis of constitutional or § 1983 grounds pleaded in the complaint but neither proven upon trial nor reached by the court in disposing of the case, does not vindicate the supreme authority of the Constitution.

On the contrary, it violates the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman,* — U.S. —, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984).

The EAHCA contains no provision for attorneys fees. *Smith v. Robinson,* — U.S. —, 83 L.Ed.2d 746, 104 S.Ct. 3457 (1984). The initial proceedings in the District Court and on the first appeal were based primarily on the EAHCA. On the second appeal, the Court of Appeals observed that Rose's complaint also alleged, among other things, that the injection of the Nebraska Commissioner of Education into the hearing process prevented that process from being impartial, in violation of the Due Process Clause of the Fourteenth Amendment. THAT CLAIM WAS NEVER PROVEN OR REACHED BY THE COURT IN DISPOSING THE CASE. Consequently, there is no basis for paying attorney's fees from the state treasury in this case. It is inconceivable that a sovereign state (or any other defendant) would be expected to pay attorney fees to one who had not prevailed and who was not injured.

## CONCLUSION

Rose cannot even claim a trivial success on the merits or a purely procedural victory. He set out to obtain damages and an injunction reversing and setting aside an administrative hearing decision on grounds of lack of impartiality and procedural violation. The litigation, however, resulted in a holding that the hearing officer's decision should be declared final and binding (which is in

accord with Nebraska law) because no procedural error had been shown and because the Commissioner's "rubber stamp" did not change the outcome of the hearing officer's decision. Thus, Rose achieved no success. The success here belongs to the attorney for the State defendants and the attorney for the Omaha School District who sought and preserved the right of the Plaintiff's deaf daughter to receive an appropriate special education that permits her to comprehend and communicate in her everyday life.

For any and all the reasons discussed here, the decision of the Court of Appeals should be reversed. Nebraska taxpayers (or for that matter, the taxpayers of any state) should not be expected to pay attorneys' fees in a case such as this.

Respectfully submitted,

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